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January 4, 2005

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JAN - 4 2005

Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

**Re: Petition for Preemption Submitted by KMC Telecom of Virginia, Inc., KMC
Telecom V of Virginia, Inc., and KMC Data LLC**

Dear Secretary Dortch:

Attached for filing with the Federal Communications Commission ("FCC") please find an original and fifteen (15) copies of the "Petition Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Sprint," being submitted on behalf of the above-referenced Parties.

If you have any questions or concerns regarding this filing, please do not hesitate to contact me at (202) 955-9785.

Respectfully submitted,

M. Nicole Oden

cc: Jeffrey Carlisle, Chief, Wireline Competition Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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JAN - 4 2005

In the Matter of)	Federal Communications Commission
)	Office of Secretary
Petition of KMC Telecom of Virginia, Inc.)	
KMC Telecom V of Virginia, Inc. and)	
KMC Data LLC Pursuant to)	CC Docket No. _____
Section 252(e)(5) of the Communications Act)	
for Preemption of the Jurisdiction)	
of the Virginia State Corporation Commission)	
Regarding Interconnection Disputes with Sprint)	

PETITION OF KMC TELECOM OF VIRGINIA, INC., KMC TELECOM V OF VIRGINIA, INC., AND KMC DATA LLC

Pursuant to section 252(e)(5) of the Communications Act (the "Act"), 47 U.S.C. §252(e)(5), and section 51.803 of the Federal Communications Commission's ("FCC" or "Commission") rules and regulations, 47 C. F. R. §51.803, KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC (collectively "KMC"), by their undersigned counsel, respectfully petition the FCC to preempt the jurisdiction of the Virginia State Corporation Commission ("VSCC") in order to arbitrate the pending interconnection disputes related to KMC's business operations in the State of Virginia between KMC and United Telephone-Southeast, Inc. and Central Telephone Company of Virginia (collectively, "Sprint" and together with KMC, the "Parties").

KMC, pursuant to section 252 of the Act, sought the intervention of the VSCC as a third party to resolve its outstanding interconnection disputes with Sprint. As it has in several similar proceedings, the VSCC expressly declined to exercise its jurisdiction under section 252 and arbitrate the Parties' interconnection disputes.¹ In this circumstance, the Act states that the FCC

¹ See *Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC For Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 and 20 VAC 5-*

“shall issue an order preempting the State commission’s jurisdiction of that proceeding” and “shall assume the responsibility of the State commission...with respect to the proceeding or matter and act for the state Commission.” 47 U.S.C. §252(e)(5). Accordingly, KMC respectfully requests that the Commission issue an Order preempting the jurisdiction of the VSCC as it relates to the Parties’ interconnection disputes. In doing so, the Commission will permit KMC to file a Petition for Arbitration before the FCC and finally resolve the remaining interconnection issues in dispute.

Further, KMC notes that the FCC has faced similar situations following the VSCC’s dismissal of other requests for arbitration.² In those instances the Commission appropriately preempted the jurisdiction of the VSCC and proceeded to arbitrate the parties’ disputes. KMC urges the FCC to take the same action now. In support thereof, KMC respectfully states as follows:

Statement of Facts

1. KMC-VA and KMC V are Virginia corporations, and KMC Data is a Delaware limited liability corporation. All three corporations are headquartered at 1545 Route 206, Bedminster, NJ 07921-2567, and maintain their principal place of business at 1755 North Brown Road, Lawrenceville, Georgia, 30043.

419-30 of the Commission’s Procedural Rules for Implementing §§ 251 and 252 of the Telecommunications Act of 1996, Case No. PUC-2004-00081, Order of Dismissal (Sept. 16, 2004). The Order of Dismissal is attached hereto as Exhibit 1.

² *See e.g. Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, (2000) (“Starpower Preemption Decision”); Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc., Memorandum Opinion and Order, CC Docket No. 00-218, FCC 01-20 (rel. Jan. 19, 2001) (WorldCom Preemption Order).*

2. KMC-VA, KMC V and KMC Data are facilities-based providers of next-generation telecommunications infrastructure and services, providing fiber-based, integrated data, voice, and Internet communications services to business, government and institutional end-users, Internet service providers, long distance carriers and wireless service providers.

3. Collectively, KMC-VA, KMC V and KMC Data, as well as their affiliated companies, are certified to provide telecommunications services in 49 states, the District of Columbia and Puerto Rico.

4. KMC-VA, KMC V and KMC Data are authorized to provide competitive local exchange and interexchange services in Virginia, including the territories served by Sprint.³

5. Sprint is an incumbent local exchange carrier ("ILEC") in Virginia, as defined by the Communications Act. *See* 47 U.S.C. § 252(h). Within its operating territory Sprint has, at all relevant times, been the dominant, if not monopoly, provider of telephone exchange service.

6. Pursuant to the Communications Act, Sprint is required to provide to requesting telecommunications carriers, among other things, interconnection, access to unbundled network elements ("UNEs"), collocation, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and resale,. *See* 47 U.S.C. §§ 251(a)-(c).

7. The terms and conditions of interconnection must comply with the provisions of sections 251 and 252 of the Communications Act. *See* 47 U.S.C. § 251(c).

³ KMC Telecom of Virginia, Inc. was authorized to provide local exchange and interexchange telecommunications services in and around Roanoke City, including Roanoke county, the City of Salem and a small section of Botetourt County on December 19, 1996 in Case No. 96-0116. On November 19, 1998 in Case No. 98-00141, KMC Telecom of Virginia, Inc. expanded its local exchange authority to include the entire Commonwealth of Virginia and was reissued a new certificate, Certificate T-370a; KMC Telecom V of Virginia, Inc. was granted a Certificate of Public Convenience and Necessity to provide local exchange telecommunications services on September 18, 2000 in Docket No. PUC000163; KMC Data LLC was granted authority to provide local exchange telecommunications services on September 25, 2001 in Docket No. PUC010138.

8. Sprint and KMC entered into an interconnection agreement (“Interconnection Agreement”) in the year 2000, which was subsequently approved by the VSCC. The Interconnection Agreement expired on or about March 15, 2002. However, the Parties agreed to continue to operate pursuant to the terms of the Interconnection Agreement, following the stated expiration date, until such time as a new interconnection agreement could be negotiated and approved.

9. The Parties began negotiation of a new interconnection agreement that would cover several states, including Virginia, in 2002. Sprint proposed its boilerplate interconnection agreement, from which the Parties commenced negotiations. During the course of the negotiations KMC and Sprint held numerous meetings, both in person and by telephone, to discuss the rates, terms and conditions pursuant to which Sprint would provide to KMC, among other things, interconnection, access to UNEs, and collocation. In fact, KMC personnel twice traveled to Sprint’s headquarters in Overland Park, Kansas, in an attempt to reach mutually acceptable agreement terms.

10. As a result of these good faith negotiations, Sprint and KMC reached agreement on most of the issues initially raised. However, several issues remained unresolved and required the intervention of a third party.

11. Under the Communications Act, parties to an interconnection negotiation have the right to petition the relevant state commission for arbitration of any open issue whenever negotiations between them fail to yield an agreement. *See* 47 U.S.C. § 252(b). Either party may seek arbitration during the period between the 135th day and the 160th day, inclusive, after the date the ILEC received the request for negotiation. *Id.*

12. For the purposes of the statutory deadlines, there is agreement among the Parties that interconnection negotiations for the Virginia agreement commenced on January 14, 2004, resulting

in the state commission arbitration window opening on May 28, 2004, and closing on June 22, 2004.

13. KMC timely filed a Petition for Arbitration with the VSCC on June 22, 2004. Section 252(b)(4)(C) of the Communications Act requires that the State commission conclude the resolution of any unresolved issues within nine (9) months after the request for interconnection negotiation was initiated. 47 U.S.C. § 252(b)(4)(C). On September 16, 2004, the VSCC addressed KMC's Petition by issuing an Order of Dismissal, in which it determined that the "arbitration proceeding should be deferred to the Federal Communications Commission ("FCC")."⁴

14. As shown, the VSCC has refused to act as a third party arbitrator and address the outstanding issues in dispute between the Parties. Consequently, KMC is filing the instant Petition requesting the Commission preempt the jurisdiction of the VSCC, thus permitting KMC to file a Petition for Arbitration before the FCC pursuant to section 252 of the Communications Act, and finally resolve the outstanding interconnection disputes between the Parties.

Argument

15. The FCC has authority to preempt the VSCC and assume jurisdiction over this dispute pursuant to section 252(e)(5) of the Act, which states as follows:

[i]f a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . and shall assume the responsibility of the state commission under this section with respect to the proceeding or matter and act for the State commission.⁵

⁴ *Order of Dismissal* at 2.

⁵ 47 U. S. C. 6 252(e)(5).

16. There is no question that the prerequisites for Commission preemption are present here. First, the Virginia arbitration proceeding was a “proceeding . . . under this section” (Section 252). KMC’s petition for arbitration was filed under Section 252(b)(1), which provides that “[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.” 47 U.S.C. § 252(b)(1). As stated previously, KMC timely brought its action before the VSCC for resolution.

17. Second, the VSCC’s “responsibility under [that] section” included applying federal law to resolve any open issues. Section 252(c) provides that “[i]n resolving by arbitration under subsection (b) any open issues, . . . a State commission shall (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251” and “(2) establish any rates for interconnection, services, or network elements according to subsection (d)” 47 U.S.C. § 252(c)(1-2); *see also* 47 U.S.C. § 252(e)(2)(B) (“The State commission may only reject . . . an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251, or the standards set forth in subsection (d) of this section”). The VSCC failed to apply federal law to the issues placed before it by KMC in its petition for arbitration.

18. Finally, the VSCC failed to “act to carry out its responsibility” under section 252. The VSCC stated, “[b]ased upon the potential conflict that could arise should the [VSCC] attempt to determine the rights and responsibilities of the parties under state law or through application of the federal standards embodied in the Telecommunications Act in the absence of complete federal rules, we find that this arbitration proceeding should be deferred to the Federal Communications

Commission (“FCC”).”⁶ The VSCC’s decision to take no action in a proceeding within its statutory authority pursuant to section 252 of the Act, without citing any substantive or procedural bar to resolution of that proceeding (other than its own desire to avoid jurisdictional conflicts with the FCC), is tantamount to “failing to act” for purposes of Section 252(e)(5).

19. Further, in 1996, the FCC adopted “interim” procedures for implementation of section 252(e)(5).⁷ Its procedural rules state that,

[f]or purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for *[sic]* a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.”⁸

20. The FCC concluded in the 2002 *Consolidated Arbitration Decision* that, “[u]nder the 1996 Act’s design, it has been largely the job of the state commissions to interpret and apply those [legislatively mandated, market-opening measures that Congress put in place] through arbitration proceedings.”⁹ The Commission went on to state that it was standing in the stead of the VSCC as

⁶ *Order of Dismissal* at 2.

⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Red 15499, 16122-16132 (1996) (*Local Competition Order*), *aff’d in part and vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F. 3d 753, 804 (8th Cir. 1997), *aff’d in part, rev’d in part sub nom.*

⁸ 47 C. F. R. § 51.801(b).

⁹ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc., and for Expedited Arbitration*, Docket No. 00-218, *Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration*, CC Docket No. 00-249, *Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.*, CC Docket No. 00-251, Memorandum Opinion and Order, DA 02-1781 at ¶ 1 (rel. July 17, 2002) (“*Consolidated Arbitration Decision*”).

it was required to do when a State commission failed to exercise its authority under section 252 of the Act.¹⁰

21. As demonstrated by the Commission's previous decision, under the circumstances at issue in this Petition, preemption under section 252(e)(5) is mandatory. Section 252(e)(5) directs that the Commission "shall" issue an order preempting the State commission where the foregoing predicates are met. Indeed, section 252(e)(6) confirms that "[i]n a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act."

22. KMC believes that the Parties have reached an impasse with regard to the remaining issues in dispute, and require a third party arbiter. Therefore, KMC requests that the Commission preempt the VSCC's authority so that the Parties may come before the FCC and resolve their outstanding interconnection disputes.

¹⁰

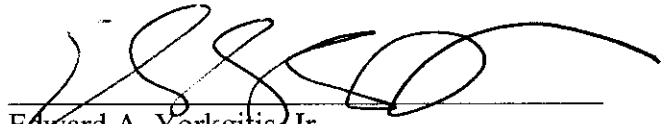
See generally Consolidated Arbitration Decision.

Conclusion

Section 252 directs the FCC to act where the state will not. For this and the foregoing reasons, KMC respectfully requests that the FCC preempt the jurisdiction of the Virginia State Corporation Commission regarding the remaining interconnection disputes between KMC and Sprint.

Respectfully Submitted,

**KMC Telecom of Virginia, Inc.
KMC Telecom V of Virginia, Inc.
KMC Data LLC**



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Dated: January 4, 2005

3. I have knowledge of the facts set forth herein and I make this affidavit in support of KMC's Petition to the Federal Communications Commission (the "Petition") to preempt the jurisdiction of the Virginia State Corporation Commission ("VSCC") with respect to disputes between KMC and United Telephone-Southeast, Inc. and Central Telephone Company of Virginia (collectively, "Sprint").

4. KMC is a competitive local exchange carrier providing local telephone services in the Commonwealth of Virginia pursuant to authority granted by the Virginia Commission.

5. Sprint is an incumbent local exchange carrier providing local telephone services in the Commonwealth of Virginia pursuant to authority granted by the Virginia Commission.

6. On or about March 15, 2000, Sprint entered into a voluntarily negotiated interconnection agreement with KMC pursuant to Sections 251 and 252 of the Act.

7. This agreement expired on or about March 15, 2002.

8. The Parties agreed to continue to operate pursuant to the terms of the Interconnection Agreement, following the stated expiration date, until such time as a new interconnection agreement could be negotiated and approved.

9. For the purposes of the statutory deadlines, there is agreement among the Parties that interconnection negotiations for the Virginia agreement commenced on January 14, 2004, resulting in the state commission arbitration window opening on May 28, 2004, and closing on June 22, 2004.

10. Sprint proposed its boilerplate interconnection agreement, from which the Parties commenced interconnection negotiations.

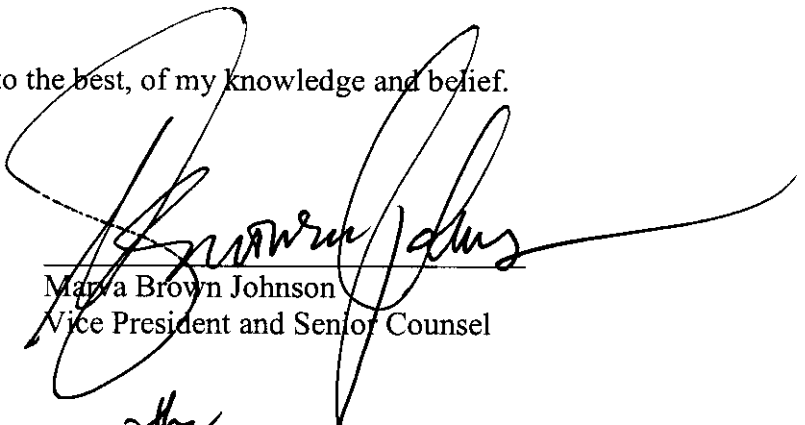
11. During the course of the interconnection negotiations, KMC and Sprint held numerous meetings, both in person and by telephone, to discuss the rates, terms and conditions pursuant to which Sprint would provide to KMC interconnection, access to UNEs, and collocation, among

other things. In fact, I twice traveled to Sprint's headquarters in Overland Park, Kansas, in an attempt to reach mutually acceptable agreement terms. As a result of these good faith negotiations, Sprint and KMC reached agreement on most of the issues originally raised. However, a number of issues remain unresolved.

12. KMC timely filed a Petition for Arbitration with the VSCC on June 22, 2004.

13. On September 16, 2004, the VSCC issued an Order of Dismissal addressing KMC's Petition, and deferring to the jurisdiction of the FCC.¹ A copy of the Order is attached to the Petition as Exhibit 1.

The foregoing is true and correct to the best, of my knowledge and belief.


Marva Brown Johnson
Vice President and Senior Counsel

Subscribed and sworn to before me this 30th day of December, 2004.


Notary Public

My Commission expires:



16, 20 07.

¹

See Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC For Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 and 20 VAC 5-419-30 of the Commission's Procedural Rules for Implementing §§ 251 and 252 of the Telecommunications Act of 1996, Case No. PUC-2004-00081, Order of Dismissal (Sept. 16, 2004).


CERTIFICATE OF SERVICE

I hereby certify that on this 4th of January, 2005, true and correct copies of the foregoing Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC, pursuant to section 252(e)(5) of the Communications Act, including all exhibits and attachments thereto, were served via UPS next day on:

Virginia State Corporation Commission
1300 East Main Street
Richmond, Virginia 23219
Re: Case No PUC-2004-00081

H. Edward Phillips
Sprint Communications Company
Legal Department
Mailstop: NCWKFR0313
14111 Capital Boulevard
Wake Forest, North Carolina 27587-5900

John F. Dudley
Division of Consumer Counsel
Office of Attorney General
900 East Main Street, 2nd Floor
Richmond, VA 23219



M. Nicole Oden

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
)	
Petition of KMC Telecom of Virginia, Inc.)	
KMC Telecom V of Virginia, Inc. and)	
KMC Data LLC Pursuant to)	CC Docket No. _____
Section 252(e)(5) of the Communications Act)	
for Preemption of the Jurisdiction)	
of the Virginia State Corporation Commission)	
Regarding Interconnection Disputes with Sprint)	

AFFIDAVIT OF MARVA JOHNSON

City of Lawrenceville :

State of Georgia, ss :

I, Marva Brown Johnson, being duly sworn, state as follows:

1. I am employed by KMC Telecom Holdings, Inc. ("KMC Holdings"), parent company of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC ("KMC"), as Vice President and Senior Counsel. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

2. I have been employed with KMC Holdings since September 2000. I joined the company as the Director of ILEC Compliance and was later promoted to Senior Counsel. I am also an officer of the company and I currently serve in the capacity of Vice President. I manage the organization that is responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, and local rights-of-way issues.